Teik Huat Farming Sdn Bhd & Ors v Megat Ahmad Shahrani Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22NCVC-88–08 OF 2014
SM KOMATHY JC
10 SEPTEMBER 2015

Evidence — Experts — Evidence of — Contradictory testimonies — Whether evidence corroborated by testimonies of other witnesses — Material facts — Failure to plead — Whether failure resulted in rejection of fact

Tort — Negligence — Duty of care — Whether there was sufficient proximity between plaintiffs, second and third defendants as to give rise to duty of care — Whether construction of bund and/or culvert caused flooding — Whether there were other causes for flooding — Whether defendants in breach of their duty to ensure culvert placed in bund of adequate size — Whether defendants entitled to rely on defence of volenti non fit injuria — Damages — Whether plaintiffs entitled to claim damages for loss of profits — Whether damages should be awarded to plaintiffs — Nuisance — Whether construction of bund and/or culvert amounted to actionable nuisance

The plaintiffs were prawn breeders whose farms were located along Sg Ayer Tawar ('the river'). The first defendant was a contractor appointed by the second defendant to construct a bridge across the river. In order to facilitate the construction of the bridge the first defendant constructed a temporary bund. The drainage department had granted the first defendant permission to construct the bund on condition that the bund would not obstruct the natural flow of water. On the evening of 19 October 2013, it had rained continuously and that night the river had burst its banks and flooded the plaintiffs' prawn farms that were located upstream in relation to the bund. The plaintiffs claimed that the flooding of their prawn farms was due to the negligence of the defendants in constructing a temporary bund across the river and thereby blocking the free flow of water. The plaintiffs commenced an action in negligence, nuisance and strict liability against the defendants and claimed damages for the losses they had suffered as a result of the flood. The defendants denied that the temporary bund was the immediate reason for the damage and destruction of the plaintiffs' farms. Instead the defendants submitted that the flood was inevitable as a result of the exceptional heavy rain that fell. The plaintiffs' expert opined that the bund and the inadequate size of the culvert placed in the bund were the immediate causes for the flooding whilst the defendants' expert disagreed and submitted that the flood occurred due to a combination of factors, namely the exceptionally heavy rain and the

occurrence of high tide in the river, downstream from the bund. The second and third defendants further argued that there was no sufficient proximity between them and the plaintiffs as to give rise to a duty of care on the grounds that the construction of the temporary bund was not provided under the contract between them and the first defendant.

Held, allowing the plaintiffs' claim for damages in the sum of RM98,551 to the first plaintiff and in the sum of RM58,551 to the second and third plaintiffs with costs of RM50,000:

(1) There was undisputable evidence that the first defendant's work was strictly supervised by the second defendant and the resident engineer of the second defendant, who had the power to order the first defendant to stop work. Further, it was the resident engineer who calculated the size of the culverts and confirmed that they were adequate to deal with heavy rainfall. In the light of these facts, there was no merit in the second and third defendants' argument that there was no sufficient proximity between them and the plaintiffs so as to give rise to a duty of care (see paras 19–20).

(2) Although the experts of both parties differed on the fundamental question as to the cause of the flood, both of them agreed on the fact that if the flood had covered the area downstream from the bund, this would indicate with certainty that the bund was not the cause of the flooding. In this respect the claim made by the plaintiffs that only the upstream was flooded was corroborated by the newspaper reports, which suggested that the bund was only partially covered with water. The most compelling evidence that supported the plaintiff's claim was the unchallenged testimony of a director of a prawn farm located downstream that his prawn farm was not affected by the flood. On the other hand, the defendants' claim that the flood occurred during high tide was unsustainable in the light of the tidal readings that negated the allegation that the flood occurred during high tide. Thus, on the evidence the area downstream from the bund had not flooded (see paras 21–26).

(3) The defendants' reliance on the Huntly estate rainfall records to prove their claim that there was exceptional rain on the night of the flood was inaccurate. Based on the findings it would have been more accurate to say that the rainfall was about 80–85mm and not 100mm as the defendants had claimed. As such, the rainfall on the night in question was not exceptional (see paras 27–28).

(4) Further, the culverts in the instant case were only designed to meet the five years ARI criteria instead of the ten years ARI criteria, which explained why they were inadequate for the purpose of carrying the rain water and why the water overflowed. In any case even if there was no requirement to meet the ten years ARI criteria, the rain that fell on the

night in question was less than 100mm. In the light of the defendants' expert's admission that the culvert was not catered even for 100mm daily rainfall meant that the defendants failed to meet even the five years ARI flood criteria (see paras 29–31).

(5) The evidence of the defendants' expert that the flood site and prawn farms was a flood plain that flooded every day during high tide was neither pleaded in the defence nor mentioned in the report prepared by the independent contractor engaged by the second and third defendants to investigate the cause of the flood. As such, this fact would have to be rejected. Based on the evidence adduced it was clear that the defendants' defence could not stand and that the flooding would not have occurred if the river had been in its natural state and not been restricted by the bund that failed to provide a culvert of adequate size to carry water from the heavy rain. The defendants were thus in breach of their duty to ensure that the culvert placed in the bund was of adequate size (see paras 33–35).

(6) The concept of *volenti non fit injuria* had no application to the facts of the present case. There was no merit in the defendants' argument that the plaintiffs' use of lands designated for oil palm planting for prawn farming triggered the maxim of *volenti non fit injuria*. In any event the maxim was neither pleaded by the first defendant as a defence nor an agreed issue for trial (see paras 36–38).

(7) The plaintiffs' submission that they need not deduct their expenses when claiming for loss of anticipated profits was untenable. In the present case, there was no evidence adduced by the plaintiffs to show the amount of damages suffered by them as loss of profits. It is trite and settled law that the plaintiffs' failure to prove damages would result in the refusal of the court to award such damages. In the circumstances, nominal damages of RM50,000 was awarded to the first plaintiff and a sum of RM20,000 to the second and third plaintiffs. In respect of the expenses for restoring the pond bunds, the plaintiffs were entitled to claim the cost of repairs, which according to the invoice was in the sum of RM20,000. In addition, the plaintiffs were entitled to claim the expenses for the survey plan and hydraulic study of RM13,551 and RM15,000 respectively. As for the expenses to replace the water paddle spare part units, a sum of RM5,000 was allowed. The plaintiffs were also awarded a sum of RM10,000 as damages for inconvenience caused by the flood. However, the claim for exemplary damages was disallowed as the construction of the bund was not done with the intention of causing hardship and inconvenience to prawn breeders (see paras 46–57).

(8) A similar conclusion would be reached in relation to the plaintiffs' claim in nuisance against the defendants. The bund was a potential nuisance which became an actual and actionable nuisance by reason of the culvert placed in the bund not meeting even the five years ARI criteria. Similarly,

the first defendant was liable to the plaintiffs for the damage suffered by them under the Waters Act 1920 (see paras 58–60).

(9) The second and third defendants were not only vicariously liable but also jointly and severally liable for the loss suffered by the plaintiffs (see para 61).

[Bahasa Malaysia summary

Plaintif-plaintif adalah penternak udang di mana ladang mereka terletak di sepanjang Sg Ayer Tawar ('sungai tersebut'). Defendan pertama adalah kontraktor yang dilantik oleh defendan kedua untuk membina jambatan menyeberangi sungai tersebut. Bagi tujuan memudahkan pembinaan jambatan itu defendan pertama telah membina benteng sementara. Jabatan perparitan telah memberikan defendan pertama kebenaran untuk membina benteng itu dengan syarat benteng itu tidak menghalang aliran semulajadi air. Pada petang 19 Oktober 2013, ia telah hujan berterusan dan malam itu sungai tersebut telah memecahkan bentengnya dan membanjiri ladang ternak udang plaintif-plaintif yang terletak di hulu sungai tersebut yang berhubung dengan benteng tersebut. Plaintif-plaintif telah mendakwa bahawa banjir pada ladang ternak udang mereka diakibatkan oleh kecuaian defendan-defendan dalam membina benteng sementara itu yang menyeberang sungai tersebut dan oleh itu menghalang aliran bebas air. Plaintif-plaintif telah memulakan tindakan dalam kecuaian, kacau ganggu dan liabiliti ketat terhadap defendan-defendan dan menuntut ganti rugi untuk kehilangan yang dialami mereka akibat banjir itu. Defendan-defendan menafikan bahawa benteng sementara itu adalah sebab segera untuk kerosakan dan kemusnahan ladang-ladang plaintif-plaintif. Sebaliknya defendan-defendan berhujah bahawa banjir yang berlaku akibat banjir manakala pakar defendan-defendan tidak bersetuju dan berhujah bahawa banjir itu tidak dapat dielakkan akibat hujan lebat yang luar biasa yang turun. Pakar plaintif-plaintif berpendapat bahawa benteng tersebut dan saiz pembetung yang tidak mencukupi yang diletakkan dalam benteng adalah punca serta merta yang menyebabkan banjir manakala pakar defendan tidak bersetuju dan berhujah bahawa banjir itu berlaku akibat faktor-faktor yang digabungkan, iaitu hujan lebat yag luar biasa dan air pasang yang berlaku di sungai tersebut, di hilir benteng tersebut. Defendan-defendan kedua dan ketiga selanjutnya bersetuju bahawa tiada kedekatan yang mencukupi antara mereka dan plaintif-plaintif untuk menimbulkan satu kewajipan berjaga-jaga atas alasan pembinaan benteng sementara tersebut tidak diperuntukkan di bawah kontrak antara mereka dan defendan pertama.

Diputuskan, membenarkan tuntutan plaintif-plaintif untuk ganti rugi sejumlah RM98,551 kepada plaintif pertama dan untuk jumlah RM58,551 kepada plaintif-plaintif kedua dan ketiga kos RM50,000:

(1) Terdapat keterangan yang tidak dipertikaikan bahawa kerja defendan pertama diselia dengan tegas oleh defendan kedua dan jurutera tetap

defendan kedua, yang mempunyai kuasa untuk mengarahkan defendan pertama berhenti kerja. Selanjutnya, ia adalah jurutera tetap yang mengira saiz pembentung-pembentung itu dan mengesahkan bahawa saiz pembentung-pembentung itu mencukupi untuk menangani hujan lebat. Berdasarkan fakta-fakta tersebut, tiada merit dalam hujah defendan-defendan kedua dan ketiga bahawa tiada kedekatan yang mencukupi antara mereka dan plaintif-plaintif sehingga menimbulkan satu kewajipan berjaga-jaga (lihat perenggan 19–20).

(2) Walaupun pakar-pakar kedua-dua pihak berbeza tentang persoalan penting berhubung sebab banjir itu, kedua-dua mereka bersetuju tentang fakta bahawa jika banjir itu meliputi kawasan hilir benteng tersebut, ini menunjukkan dengan pasti bahawa benteng tersebut tidak menyebabkan banjir itu. Berhubung tuntutan yang dibuat oleh plaintif-plaintif bahawa hanya hulu sungai yang banjir telah disokong dengan laporan surat khabar, yang mencadangkan bahawa hanya sebahagian benteng tersebut ditutup dengan air. Sebaliknya, tuntutan defendan-defendan bahawa banjir itu berlaku semasa air pasang adalah tidak mampan berdasarkan kepada bacaan pasang surut yang menafikan dakwaan bahawa banjir itu berlaku ketika air pasang. Oleh itu, berdasarkan keterangan kawasan hilir dari benteng itu tidak dilanda banjir (lihat perenggan 21–16).

(3) Kebergantungan defendan-defendan ke atas rekod-rekod liputan hujan ladang Huntly membuktikan tuntutan mereka bahawa terdapat hujan yang luar biasa pada malam banjir itu tidak tepat. Berdasarkan penemuan tersebut lebih tepat untuk mengatakan bahawa hujan turun lebih kurang 80–85mm dan bukan 100mm sebagaimana defendan-defendan menuntut. Oleh itu, hujan pada malam yang dipersoalkan tidak luar biasa (lihat perenggan 27–28).

(4) Selanjutnya, pembentung-pembentung dalam kes ini hanya direka untuk memenuhi kriteria lima tahun ARI dan bukan kriteria sepuluh tahun ARI, yang menjelaskan kenapa mereka tidak mencukupi bagi tujuan membawa air hujan itu dan kenapa air itu melimpah. Dalam apa-apa kes jikapun tidak terdapat keperluan untuk memenuhi kriteria sepuluh tahun ARI, hujan yang turun pada malam yang dipersoalkan itu kurang daripada 100mm. Berdasarkan pengakuan pakar defendan-defendan bahawa pembentung itu tidak menampung 100mm hujan setiap hari bermaksud defendan-defendan gagal memenuhi kriteria banjir lima tahun ARI (lihat perenggan 29–31).

(5) Keterangan pakar defendan-defendan bahawa banjir dan ladang udang itu terdapat dataran banjir yang banjir setiap hari semasa air pasang tidak dipli dalam pembelaan atau disebutkan dalam laporan yang disediakan oleh kontraktor bebas yang dilantik oleh defendan-defendan kedua dan ketiga untuk menyiasat sebab banjir itu. Oleh itu, fakta ini harus ditolak. Berdasarkan keterangan yang dikemukakan ia jelas bahawa pembelaan

defendan-defendan tidak boleh kekal dan bahawa banjir itu tidak mungkin berlaku jika sungai tersebut dalam keadaan semulajadinya dan tidak dihalang oleh benteng itu yang gagal menyediakan pembentung yang saiznya mencukupi untuk menampung air dari hujan lebat itu. Defendan-defendan dengan itu telah melanggar kewajipan mereka untuk memastikan pembentung itu diletakkan dalam bentung yang mempunyai saiz yang mencukupi (lihat perenggan 33–35).

(6) Konsep *volenti non fit injuria* tidak terpakai kepada fakta kes ini. Tiada merit dalam hujah defendan-defendan bahawa penggunaan tanah plaintif-plaintif direka untuk penanaman kelapa sawit bagi ternakan udang mencetuskan maxim *volenti non fit injuria*. Dalam apa keadaan maxim itu tidak dipli oleh defendan petama sebagai pembelaan ataupun isu dipersetujui untuk perbicaraan (lihat perenggan 36–38).

(7) Hujah plaintif-plaintif bahawa mereka tidak perlu memotong perbelanjaan mereka apabila menuntut kehilangan keuntungan yang dijangkakan tidak dapat dipertahankan. Dalam kes ini, tiada keterangan dikemukakan oleh plaintif-plaintif untuk menunjukkan jumlah ganti rugi yang dialami oleh mereka sebagai kehilangan keuntungan. Ia adalah lapuk dan undang-undang tetap bahawa kegagalan plaintif-plaintif untuk membuktikan ganti rugi akan mengakibatkan keengganan mahkamah mengawardkan ganti rugi sedemikian. Dalam keadaan berikut, ganti rugi nominal RM50,000 telah diawardkan kepada plaintif pertama dan sejumlah RM20,000 kepada plaintif-plaintif kedua dan ketiga. Berhubung perbelanjaan membaik pulih benteng kolam, plaintif-plaintif berhak untuk menuntut perbelanjaan bagi pelan ukur dan kajian hidraulik sejumlah RM13,551 dan RM15,000 masing-masingnya. Berhubung perbelanjaan bagi menggantikan unit-unit bahagian ganti dayung air, sejumlah RM5,000 dibenarkan. Plaintif-plaintif juga diawardkan sejumlah RM10,000 untuk kesulitan akibat banjir itu. Walau bagaimanapun, tuntutan untuk ganti rugi teladan tidak dibenarkan kerana pembinaan benteng tersebut tidak dilakukan dengan niat menyebabkan kesusahan dan kesulitan kepada penternak-penternak udang (lihat perenggan 46–57).

(8) Satu kesimpulan yang sama akan dicapai berhubung dengan tuntutan plaintif-plaintif kerana kacau ganggu terhadap defendan. Benteng tersebut adalah gangguan yang berpotensi yang menjadi kacau ganggu yang sebenar dan boleh diambil tindakan oleh sebab pembentung yang diletakkan dalam benteng tersebut tidak langsung memenuhi kriteria lima tahun ARI. Begitu juga, defendan pertama adalah bertanggungjawab kepada plaintif-plaintif kerana kerosakan yang dialami oleh mereka di bawah Akta Air 1920 (lihat perenggan 58–60).

(9) Defendan-defendan kedua dan ketiga bukan sahaja bertanggungjawab secara vikarius tetapi juga bertanggungjawab secara bersama dan secara

berasingan untuk kehilangan yang dialami oleh plaintif-plaintif (lihat perenggan 61).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1381–1500.

For cases on expert evidence in general, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 1862–2020.

Cases referred to

Anglia Television Ltd v Reed [1971] 3 All ER 690, CA (refd)

CCC Films (London) Ltd v Impact Quadrant Films Ltd [1984] 3 All ER 298, QB (refd)

Greenock Corpn v Caledonian Rly Co, Same v Glasgow and South-Western Rail Co [1917] AC 556, HL (folld)

Guan Soon Tin Mining Co v Ampang Estate Ltd [1973] 1 MLJ 25, FC (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

Ismail v Haji Taib [1972] 1 MLJ 259, FC (refd)

Lee Geok Theng v Ngee Tai Hoo & anor [2000] 4 MLJ 42, HC (refd)

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165, SC (refd)

Malie bin Jolhi (suing as administrator of the estate of Rumi Azzan bin Malie, deceased and for and on behalf of the dependents of the deceased) v Pengarah Jabatan Alam Sekitar (Negeri Sarawak) Kementerian Sains, Teknologi dan Alam Sekitar & Ors [2011] 3 MLJ 250; [2011] 5 CLJ 83, HC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, HC (refd)

Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286, FC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 AMR 41, FC (refd)

Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] 5 CLJ 229; [2012] AMEJ 0030, CA (refd)

Legislation referred to

Waters Act 1920 ss 5(1), 13, 17

Kelvin Ding (Nga Hock Cheh & Co) for the plaintiffs.

Ahmad Yani, Faizul Hilmi and Nurul Jannah (Mior & Assoc) for the first defendant.

Khairul Nizam Mohd Kamal (Federal Counsel, Attorney General's Chambers) for the second defendant.

SM Komathy JC:

CASE FOR THE PLAINTIFFS

[1] The plaintiffs are prawn breeders whose farms were located along a river. The prawn farms were inundated by flood waters at about 10.30 on the night of 19 October 2013 when the river burst its banks. The plaintiffs allege that the flood was due to the negligence of the defendants in constructing a temporary bund across the river and thereby blocking the free flow of water. In the alternative, it was pleaded the flood was caused by the culverts placed in the temporary bund which were of inadequate capacity to provide a passage way for the flow of water. They claim damages for the losses they have suffered as a result of the flood.

[2] The claim against the defendants has been brought in negligence, nuisance and strict liability.

CASE FOR THE DEFENDANTS

[3] The defendants denied that the temporary bund was the immediate reason for the damage and destruction of the plaintiffs' farms. It was alleged that the flood was inevitable as a result of exceptional heavy rain that fell. The river water was unable to flow through the culverts as a result high tide in the downstream area which prevented the river water from flowing out to the sea, and instead pushed it upstream causing the flooding.

THE PARTIES

[4] Teik Huat Farming Sdn Bhd, the first plaintiff, is a corporation. The second and third plaintiffs are partners in a firm called Ah Ning Enterprise. The first defendant, Megat Ahmad Shahrani Sdn Bhd, is an contractor appointed by the second defendant to construct a bridge to connect Kg Baru and Kg Teluk in Ayer Tawar Manjung Perak. The third defendant, the Government of Malaysia, is the employer of the second defendant.

BACKGROUND FACTS

[5] Sometime at the end of October 2013, a temporary bund ('the bund') was erected by the first defendant's subcontractor ('DW1'), after obtaining the requisite permission from the Drainage and Irrigation Department ('JPS'). Permission was granted on condition that the bund would not obstruct the natural flow of the river. The bund was constructed across Sg Ayer Tawar to

facilitate the construction of the bridge. The bund measured 240 meters in length, 12 feet nine inches in height (from the lowest river level) and eight meters wide and made of red earth.

[6] Sg Ayer Tawar, the river across which the bund was constructed, is a tributary of Sg Manjung, the main river that discharges into the Straits of Malacca at Lumut. There was an 'island' in the middle of the Sg Ayer Tawar where the bund was built. The island caused the river to branch into two smaller rivers which subsequently converged downstream. The plaintiffs' prawn farms were located on one of these two smaller rivers. During high tide, the water would not flow through the river branches but instead would flow over and submerge the island.

[7] The plaintiffs' prawn farms were located upstream in relation to the bund, on the river branch of Sg Ayer Tawar, on the Kg Baru side. On the evening of 19 October 2013, it rained continuously from 5.30pm and at about 10.30pm that night the river burst its banks and flooded the prawn farms.

THE TRIAL

[8] I heard evidence from the plaintiffs and ten witnesses called on their behalf. For the defendants, I heard evidence from three of their representatives and two other witnesses. The witnesses called by the plaintiffs were:

(a) PW1 (Lim Leong Nge, a director of the first plaintiff);

(b) PW2 (Ahmad Zaki bin Ahmad Saad, an officer from the meteorological department of Malaysia);

(c) PW3 (Lim Nong Chowng, a prawn farmer and director of Dindings Aquatic Supplier Sdn Bhd);

(d) PW4 (Tan Siak Kuang, a seller of prawn fry);

(e) PW5 (Ong Ching Chock, a prawn harvester/seller);

(f) PW6 (Sim Yeow Tiam, a prawn harvester/seller);

(g) PW7 (Tan Teong How, a prawn harvester/seller);

(h) PW8 (Ling Ka Lee, a contractor);

(i) PW9 (Lim Chee Soon, the second plaintiff);

(j) PW10 (Ahmad Roslan Mokhtar, a licensed land and engineering surveyor);

(k) PW11 (Raja Firdaus bin Raja Ismail,a land owner); and

(l) PW12 (Liam Wee Lin, a consulting engineer specialising in hydrology and hydraulics).

[9] The witnesses called by the defendants were:

(a) DW1 (Gobi a/l Silvariju, the sub-contractor);

(b) DW2 (Mohamad Amin bin Azahari, a JPS officer);

(c) DW3 (Lew Kwok Yen, a consultant engineer with second defendant);

(d) DW4 (Chuah Chai Yew, a civil and structural engineer); and

(e) DW5 (Amran bin Mohd Nor, a district engineer for JKR Manjung).

THE LAW

[10] The parties are broadly in agreement as to the principles that apply to this case. It is accepted that there is a duty on any one who interferes with the course of a river to ensure that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by heavy rainfall. It is also accepted that if the said works impede the flow of the water and thereby cause the river to burst its banks, the contractor who carried out the works or the person having control over the obstruction will be liable to compensate the owners of adjoining properties for losses flowing from the flood. Equally, it is accepted that that if the flood was unavoidable due to exceptionally heavy rain that was unprecedented, this would afford a complete defence to the plaintiffs' claim in respect of the flood.

[11] In *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286, the Federal Court quoted with approval the following passage in the judgment of the House of Lords in the case of *Greenock Corpn v Caledonian Rly Co, Same v Glasgow and South-Western Rail Co* [1917] AC 556:

> It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

EXPERT TESTIMONY

[12] There is a serious conflict of expert evidence on the cause of the flood. The plaintiffs expert PW12 opined that the bund and the inadequate size of the culvert placed in the bund were the immediate causes for the flooding, whilst the defendants expert, DW4 disagreed. According to him, the flood occurred due to a combination of a few factors, namely exceptionally heavy rain and the occurrence of high tide in the river, downstream from the bund.

[13] I start with the report prepared by PW12. It will be helpful, if I set out the pertinent passages in his report that he took into consideration in coming to his conclusion:

> When it rains heavily as was the case during 19 October 2013, a flood flow will be generated and how high is the peak flood discharge depends on the catchment area, the steepness of the terrain and the land use. Conservatively, a rain of 79mm/day would generate a flood discharge of 12m3/s (estimated based on JPS's HP11 – see Appendix 4). When this high discharge arrives, it will find it difficult to flow downstream through a constricted outlet and to enable flow to go through the water level upstream will built up (rise higher that the downstream level) to create sufficient pressure to force the water through the constricted outlet. Consequently the upstream ponds were flooded. This was probably the phenomena when the flood occurred in 19 October 2013.
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> The downstream ponds were not flooded since the flow in the river downstream was not blocked by any bunds. Therefore, the water level downstream of the bunds remain low on 19 October 2013. In fact when the flood overspilled into the ponds at 10.30pm on 19 October 2013, it was (according to JUPEM's tide table) during low tide. The low tide level according to JUPEM's tide table is lower that RL-0.5m (see Appendix 1)

[14] He further mentioned that the normal acceptable practice of constructing a temporary structure across the river is to provide culvert(s) which meet the ten years annual rainfall intensity ('ARI').

[15] On the other hand, DW4 gave a different account of the reasons for the flood:

> In order to understand the flooding of prawn farm, the above hydraulic study of the catchment area is referred. From all the report(s) the hydrological study and the newspaper report. There is no denial that the flood plain is flooded with water on 19 October 2013. In fact the hydrology study to prove the flood plain is flooded is academic only. This is so because the pictures show the flood situation quite clearly. The flooding is at both the upstream and downstream of the bund. The question is that why the flood level in the flood plain is so high. Is it the predicted rainstorm of 1:100 year? ...
>
> It is also good to check incidence occurs on 19 October 2013. The rainfall at that time the surrounding catchment areas needed to look into. From the report of the rainfall intensity on 19 October 2013 is 100mm. The Lumut tidal report on 19 October 2013 is as high as 3.2m ODL at about 3:0am. In fact from 1:0am the tide is at 2.1 m already. The normal rainfall intensity is around the area is 21.6mm. Hence the rainstorm on the particular incidence is ready exceptional and unexpected. In other words it is more that 1:100 years rainstorm. The flood plain will be flooded with or without the pipe culvert and/or box culvert because the high tidal already exceeded the height of the bund. There is no way to prevent the flooding of the surrounding area which is below the level of 2.6m ODL. It is noted the prawn farm bund level is only 2.3m. Hence the flood occurs in the prawn farm not due to the temporary bund.

[16] DW4 also disagreed that a temporary structure blocking a river flow must meet the ten years flood criteria. According to him, it was sufficient if it met the five years criteria.

ISSUES FOR DETERMINATION

[17] There are essentially four issues for determination:

(a) whether there was sufficient proximity between the second and third defendants and the plaintiffs to give rise to a duty of care;

(b) whether the flooding of the prawn farms was caused by the bund and/or culvert;

(c) whether the defendants are entitled to rely on the defence of maxim of volunti non fit injuria; and

(d) the damages that should be awarded to the plaintiffs if the answer to question (b) was in the affirmative and the answer to question (c) was in the negative.

Issue 1: whether there was sufficient proximity between the second and third defendants and the plaintiffs to give rise to a duty of care

[18] The second and third defendants alleged that there was no sufficient proximity between them and the plaintiffs as to give rise to a duty of care. This argument was formulated on the basis that the construction of the bund was not provided under the contract between them and the first defendant. As it was constructed by the first defendant on its own initiative, it was argued, they owed no duty of care.

[19] There is undisputable evidence that the first defendant's work was strictly supervised by the second defendant and DW3, as the resident engineer of the second defendant, had the power to order the first defendant to stop work. Futhermore, it was DW3 who calculated the size of the culverts and confirmed that they were adequate to deal with heavy rainfall.

[20] In the light of these facts, I cannot accept the allegation that there was no sufficient proximity between them and the plaintiffs so as to give rise to a duty of care.

Issue 2: whether the bund was cause of the flooding

[21] It bears mention here that although the experts differed on the fundamental question as to the cause of the flood, both however agree on one

point. They were unanimous in their view that if the flood had covered the area downstream from the bund, this would indicate with certainty that the bund was not the cause for the flooding.

[22] It therefore becomes necessary to examine the evidence to determine whether there was flooding downstream. The plaintiffs' witnesses maintained that failure of the culvert to take the excessive rainfall going into the stream led to a situation where the stream overflowed at the point of the bund resulting in a flood upstream from the bund. They maintained that the area downstream was not flooded. On the other hand, the defendants alleged otherwise and relied on the testimony of DW1, the subcontractor appointed by the first defendant to construct the bund. When DW1 was questioned on this point, he gave conflicting accounts. Initially he said the whole area was flooded, but later stated that he could not tell whether the downstream area beyond the bund was also flooded as it was pitch dark and visibility was poor.

[23] The claim made by the plaintiffs that only the upstream was flooded is corroborated by the following pieces of evidence. It was in evidence that newspaper reporters had come to the flood site at about midnight and taken photographs of the bund. The photograhs were published in the newspapers the next day under the heading, 'Sebahagian jalan tanah kuning yang merupakan akses ke tapak pembinaan jambatan juga dibanjiri air', suggesting that the bund was only partially covered with water. There is no mention in the report that the whole area was flooded as alleged by the defendants. The most compelling evidence that supports the version of the plaintiff is the unchallenged testimony of PW3, a director in a company named Dindings Aquatic Supplier Sdn Bhd. According to him, Dindings Aquatic Supplier Sdn Bhd's prawn farm located downstream, about 150 meters after the bund was not affected by the flood.

[24] The defence contended that it was not probable that Dindings Aquatic Supplier Sdn Bhd and the area downstream from the bund was not flooded because it was high tide at the material time. In light of this allegation, it is necessary to set out the tide readings prepared by the Hydrographic Centre of the Royal Malaysian Navy for 19 and 20 October 2013:

19th October 2013 (Saturday)

0am (1.5m)

1am (2.1m)

2am (2.7m)

3am (3.0m)

4am (3.2m)

5am (3.1m)
6am (2.7m)
7am (2.1m)
8am (1.5m)
9am (1.0m)
10am (0.7m)
11am (0.7m)
12pm (1.1m)
1pm (1.6m)
2pm (2.2m)
3pm (2.6m)
4pm (2.8m)
5pm (2.9m)
6pm (2.6m)
7pm (2.1m)
8pm (1.6m)
9pm (1.2m)
10pm (0.9m)
11pm (0.9m)
20th October 2013 (Sunday)
0am (1.2m)
1am (1.8m)
2am (2.4m)
3am (2.8m)
4am (3.1m)
5am (3.2m)
6am (2.9m)

[25] From the tide table, the tide gauge reading at 10.30pm on 19 October 2013 , when the flood first occurred was 0.9m, the lowest tide of the day. The graph drawn by DW4 on the hourly tidal movement establishes this material fact. The graph shows that at 6pm on that day, the tide started to retreat towards the sea and the lowest tide occurred between 10pm to 11pm. The tide waters only started to move inland after midnight that day. It further shows that

when the rain started at about 5.30pm on 19 October 2013, the tide waters had begun to retreat back towards the sea and the flooding occurred during the lowest tide around 10pm-11pm.

[26] On the aforesaid evidence, the claim that the flood occurred during high tide is unsustainable. The tidal readings negate the allegation that the flood occurred during high tide. On the evidence, I find that the area downstream from the bund did not flood.

[27] Before I proceed to deal with the other issues in this case, it is pertinent to examine the defence of exceptional rain. The defendants relied on the weather records from Huntly estate to prove their claim that there was exceptional rainfall of 100mm per day on the night of the flood. In cross-examination, DW2, the JPS officer admitted that Huntly estate does not actually fall within the catchment area for Sungai Ayer Tawar as it is situated 20km away and located near the town of Pantai Remis. He further agreed that Sitiawan and Titi Gantung rainfall stations which belong to the meteorological department of Malaysia are closer to the flood site, 10km and 18km respectively. Sitiawan is situated downstream and Titi Gantung upstream of the flood site. Both stations recorded rainfall amount of 79.2mm and 65.9mm respectively. It is apposite to mention here that DW2 admitted that the data from meteorological department of Malaysia are reliable and conclusive in this regard. It is important to note that under further cross-examination, DW2 conceded that the nearest JPS rainfall station to the flood site was Walbrook estate, located 5km away and the rainfall recorded was 85mm.

[28] These facts show quite clearly that the claim made by the defendants that there was rainfall of 100mm per day on the night of the flood is not accurate. The rainfall data in relation to Sitiawan, Titi Gantung and Walbrook estate are, in my view, more relevant and applicable to determine the amount of rainfall that fell on the night in question. Based on the data it is my finding that the rainfall was about 80 to 85mm and not 100mm. This was not exceptional rainfall as alleged by the defendants.

[29] Next, I turn now to consider whether the culverts placed in the bund met the ARI criteria. It is common ground that the culverts must have the capacity to carry heavy rainfall going into the river. In designing a culvert, it was incumbent on the defendants to consider the rainfall records of the area to determine the heaviest rainfall that the area had experienced.

[30] As noted earlier, PW12 and DW4 could not agree on whether culverts placed in the bund must meet the ten or five years ARI. According to DW3 , it was a JPS requirement that the culverts in temporary structures must meet the five year ARI criteria. However, his evidence was not supported by DW2 who

explained that no special conditions were stipulated and he had left it to DW3 to determine the size of the culvert. In fact, DW2 under cross-examination agreed it was a fair statement for PW12 to state in his report that the common practice was to check if a flood normally of 10 year ARI flood can pass through the blocked channel. In the absence of evidence to show that DW3 and DW4 hold any professional qualifications in hydrology, I am inclined to prefer the opinion expressed by PW12 and DW2 that the culverts must meet the ten years criteria. The culverts in the instant case were only designed to meet the five years ARI criteria and this explains why they were inadequate for the purpose of carrying the rain water and why the water overflowed.

[31] In the event, I am wrong in holding that the culverts should have met the ten years ARI criteria, I proceed to consider whether they at least met the five years ARI criteria. Huntly estate rainfall records relied upon by the first defendant show that on 11 July 2012, rainfall had touched 107mm per day. This was more than the 100mm rainfall amount which DW4 described as exceptional and unexpected. This was just one year before the date of the flood. The box culvert was thus not designed even for 100mm rainfall amount indicating that it did not even meet the five years ARI criteria. As the rain that fell at the flood site was actually less than the five years ARI, if the design of the culvert had even met that criteria. In my judgment, the water would have flowed through without causing damage. In light of DW4's admission that the culvert was not catered even for 100mm daily rainfall, it follows that the defendants failed to meet even the five years ARI flood criteria.

[32] The rainfall records also show that in Sitiawan, there were 14 instances where the rainfall within the period of 1999–2012 exceeded 100mm daily rainfall; the highest was 175.4mm on 21 October 2008, and in Titi Gantung, there were six instances where the rainfall within the period of 2004–2013 exceeded 100mm daily rainfall; the highest was 276mm on 18 November 2006. In these two areas alone, there were already a total of 20 instances within a period of just 13 years where the rainfall exceeded 100mm daily rainfall. In this connection, it is instructive to refer to the dictum of Lord Dunedin in *Greenock Corpn*:

> The appellants argue that ... if they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to.

Applying this principle here, it means even if the volume of rainfall received in Kg Baharu was different from that in the adjacent areas, the defendants are still

bound to consider that Kg Baharu could at any time be subjected to the same rainfall received in nearby places such as Sitiawan and Titi Gantung. This they had failed to do so.

[33] There is yet one other point. DW4 stated that the flood site and prawns farms was a flood plain. It flooded everday during high tide. According to him when the tide table reading reached 2.6m and beyond, the area would be flooded because the pond embankments were lower than 2.6m. He further alleged that the bund itself was submerged 79 times in two months, and that the prawns farms experienced flooding everyday.

[34] If indeed this was so, it is odd that this material fact is not pleaded in the defence. Nor is it mentioned in the report prepared by the independent contractor engaged by the second and third defendants to investigate the cause of the flood. It is also difficult to comprehend the basis for DW4 to assert the area flooded every day when by his own admission, he has never been to the site when the tide reading reached 3.2m. I reject DW4's claim that the area was a flood plain that flooded everyday.

[35] Having considered the evidence, I am unable to conclude in favour of the defendants that it was a combination of exceptional rain and incoming high tide had caused the flooding. On the contrary, the evidence tends to point in the opposite direction, namely that the flooding would not have occurred if the river had been in its natural state and not restricted by the bund that failed to provide a culvert of adequate size to carry water from the heavy rain. The defendants were in breach of their duty to ensure that the culvert placed in the bund was of adequate size.

Issue 3: volenti non fit injuria

[36] The defendants pointed out that the lands on which the plaintiffs operated their prawn farms were designated for oil palm planting. According to them, this was because oil palm trees would not be affected by the flooding of sea water during high tide. By operating the prawn farms in this area, the plaintiffs had assumed the risks inherent on the land. The defendants were thus entitled to rely on the defence of *volenti non fit injuria*. This defence simply means 'that to which a man consents cannot be considered an injury. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. Mere knowledge of a risk does not amount to consent'. See *Lee Geok Theng v Ngee Tai Hoo & anor* [2000] 4 MLJ 42.

[37] Again, I agree with the plaintiffs that the concept of volenti non fit injuria has no application to the facts. The prawn farms were operating for many years since 1997, without incident. The pond bunds had protected the

ponds without a single incident until the bund was constructed by the defendants. The plaintiffs had never consented to the creation of the bund but had opposed it. I do not accept the argument that the plaintiffs use of lands designated for oil palm planting for prawn farming triggers the maxim of *volenti non fit injuria*. In any event, the evidence demonstrates that the lands along the river were suitable for both oil palm planting and prawn farming. The title deed for Lot 38806 where PW3's company operated the farm was designated for prawn breeding. The first plaintiff's prawn farm was close to PW3's farm.

[38] In any event, the maxim was never pleaded by the first defendant as a defence and nor was it an agreed issue for trial. If the first defendant wishes to rely on this defence, it must clearly plead (a) the facts of which the plaintiff was fully appraised giving rise to the risk of injury; (b) the plaintiff understood the risk and injury; and (c) the plaintiff voluntarily undertook to be responsible for the risk. See *Lee Geok Theng v Ngee Tai Hoo & Anor* [2000] 4 MLJ 42. The absence of any such plea, the defence fails.

Issue 4: damages

[39] The function of damages in contract is primarily to put the injured party as far as possible in the position he would have been had the contract been performed. Whereas, the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed.

[40] The damages claimed by the plaintiffs were as follows:

The first plaintiff:

(a) loss in sale value of prawn harvest — RM824,965;

(b) expenses for restoring pond bunds — RM86,275;

(c) expenses for survey plan — RM13,551;

(d) expenses for hydraulic study — RM15,000;

(e) expenses for water paddle spare part units — RM16,005;

(f) general damages for inconvenience — RM50,000; and

(g) exemplary damages at the rate of 30% on total compensatory amount (RM1,005,796) in the sum of RM301,738.

The second and third plaintiffs:

(a) loss in sale value of prawn harvest — RM515,495;

(b) expenses for survey plan — RM4,907;

(c) expenses for hydraulic study — RM15,000;

(d) expenses for water paddle spare part units — RM13,219;

(e) general damages for inconvenience — RM50,000; and

(f) exemplary damages at the rate of 30% on total compensatory amount (RM598,621) in the sum of RM179,586.

(a) Loss of profits

[41] I deal first with the plaintiffs claim for loss in sale value of prawn harvest ie loss of profits. The law on this subject is set out in Lord Denning MRs judgment in *Anglia Television Ltd v Reed* [1971] 3 All ER 690:

> It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits: or for his wasted expenditure but he must elect between them. He cannot claim both. If he has not suffered any loss of profit — or cannot prove what his profit would have been — he can claim in the alternative the expenditure which has been thrown away that is, wasted by reason of the breach. That is shown by *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292, 303, 308.
>
> If the plaintiff claims wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also for expenditure incurred before the contract provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken.

[42] The damages claimed by the plaintiffs under (a) is in essence a claim for the revenue that they would have earned if not for the flood. The plaintiffs contended that the expenses incurred in generating the revenue need not be deducted in determining the gross profit due to them. The following passage in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1984] 3 All ER 298 was cited in support of this proposition:

> It is, I think, important in this context to distinguish between the term 'loss of profit' and the term 'recovery of expenditure'. When Lord Denning MR speaks in *Anglia Television Ltd v Reed* of the plaintiffs not having suffered loss of profits or of it being impossible for them to prove what their profits would have been, he is referring, I believe, to profits after recoupment of expenditure, ie net profits. The plaintiffs in *Anglia Television Ltd v Reed* were by the defendant's breach deprived of putting to the test whether and to what extent they would have (a) recouped their expenditure and (b) gone on to make a net profit and of how much. It may well be that they could have led some evidence as to the probabilities in relation at least to the first of these matters. They had a script and no doubt they had budget and profit forecasts which could have been reinforced by evidence as to their experience with other similar projects.

[43] I find nothing in the passage cited above that supports the plaintiffs submission that expenditure need not be deducted from revenue in a claim for loss of gross profits. Gross profit is a company's residual profit after selling a product or service and deducting the cost associated with its production and sale.

[44] The principle laid down in *Anglia Television Ltd v Reed* was approved and applied by the Federal Court in *Ismail v Haji Taib* [1972] 1 MLJ 259. In *Haji Taib*, the appellant brought an action against the respondent/landlord for trespass and damages on the grounds that he was deprived of cultivating padi land and deriving benefit therefrom and had thereby suffered special and general damages. The court deducted a sum of RM500 as being expenses that the plaintiff. Suffian FJ stated:

> As regards damages, as has already been stated the plaintiff claimed both special damages and general damages. Under special damages he claimed a sum of $1,224, the proceeds at $85 per kuncha of the padi which he estimated he would have harvested less the amount of padi he would have had to give the landlord by way of rent. The trial president allowed this claim though there was no evidence to show that the estimate was reasonable. Even if the estimate was reasonable, the plaintiff should not have been awarded the full sum claimed ($1,224), because there should be deducted from it what he would have had to spend on producing the estimated amount of padi. Here there was no evidence to suggest that the plaintiff had spent any money on the padi field, the evidence being merely that he had prepared the land for planting. The cost of preparing the land was assessed by the learned appeal judge at $500, which was also the figure assessed by the trial president as general damages. We think it reasonable to award the plaintiff by way special damages the sum of $1,224 less $500, the assessed cost of preparing the land.

[45] In *Tan Sri Khoo Teck Puat & anor v Plenitude Holdings Sdn BHd* [1994] 3 MLJ 777, Edgar Joseph FCJ explained the principle at p 796:

> When, as here, the purchaser has claimed loss of profits for anticipated sales, it would have to be assumed that these two awards are based on expenses which would have been incurred anyway. This point was made in *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923 where it was held that a plaintiff could not claim both his capital loss, ie expenditure incurred, as well as his loss of gross profits. The plaintiff was required to choose between his two claims; in other words, he would have to elect between being put back into the position he would have been if the contract had not been made, that is to say recover his net outlay or claim what he would have received if the contract had been made, that is to say, recover his gross profits on lost sales.

[46] The cases discussed above illustrate that the plaintiffs' submission that a plaintiff need not deduct his expenses when claiming for loss of anticipated

profits is untenable. A plaintiff can only claim for one or the other, but not both. It cannot be gainsaid that profits would only have been made if expenditure had been incurred.

[47] Revering to the present case, there is no evidence to show the expenditure that the plaintiffs have incurred and would have to incur to generate the loss of profits claimed as damages. No were tax returns produced to show the profits earned by the plaintiffs in the previous years. There is thus no evidence to show the amount of damages suffered by the plaintiffs as loss of profits.

[48] It is trite and settled law that where a plaintiff brings an action for damages, he must prove the actual damages or the reasonable compensation for it in accordance with the settled principles. In order to recover the damages, he has to discharge the burden of proving both the fact of damage and the amount of damage. Any failure to prove such damages will result in the refusal of the court to award such damages. See *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (FC); *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229; [2012] AMEJ 0030 (CA); *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25 and *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 AMR 41).

[49] In *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, His Lordship Ong Hock Thye FJ in delivering the judgment of the Federal Court at p 100 explained:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed), para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it.

[50] In the circumstances, I award nominal damages of RM50,000 to the first plaintiff and a sum of RM20,000 to the second and third plaintiffs

(b) Expenses for restoring bund

[51] The next head of damages is for expenses incurred for restoring pond bunds. This item is only claimed by the first plaintiff. It was in evidence that the invoice produced by the first plaintiff in support of the claim, included the cost of repairs and the cost of increasing the height of the existing prawn pond bunds by one feet. I agree with the defendants that the plaintiff is only entitled to claim the cost of repairs. I award the sum of RM20,000 in light of the admission of the first plaintiff's witness that he was unable to tell from the invoice what portion was for repair works.

(c) Expenses for survey plan and hydraulic study

[52] The defendants did not dispute that the plaintiffs' entitlement to claim for the expenses incurred for the survey plan and hydraulic study, nor the quantum claimed. I therefore allow the sum of RM13,551 and RM15,000 claimed by them as expenses for survey plan and hydraulic study, respectively.

(d) Expenses for water paddle spare part units

[53] The plaintiffs claimed for expenses to replace the water paddle spare part units. I allow a sum of only RM5,000 in the absence of satisfactory evidence that the amount claimed was indeed incurred.

(e) General damages for inconvenience

[54] I award a sum of RM10,000 to the plaintiffs as damages for inconvenience caused by the flood.

(f) Exemplary damages

[55] The plaintiffs also seek exemplary damages. In *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337, James Foong J held:

> While considering the request for exemplary damages, this court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the court's indignant attitude towards the acts committed by the defendants. However, through the enlighten judgment of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 (at p 1226), such damages must be restricted to situation where there are 'oppressive, arbitrary or unconstitutional action by the servants of the government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'. Outside these two categories, exemplary damages should not be awarded.

[56] In *Malie bin Jolhi (suing as administrator of the estate of Rumi Azzan bin Malie, deceased and for and on behalf of the dependents of the deceased) v Pengarah Jabatan Alam Sekitar (Negeri Sarawak) Kementerian Sains, Teknologi dan Alam Sekitar & Ors* [2011] 3 MLJ 250; [2011] 5 CLJ 83, VT Sinhgam J echoed the same view:

> Exemplary damages, on the other hand, are not meant to merely compensate the tort victim but meant to punish the tortfeasor. Its application was discussed in the famous case of *Rookes v Bernard* [1964] AC 1129. Exemplary damages is generally discouraged and awarded only in exceptional cases.

[57] Based on the principles stated in the foregoing cases, I disallow the claim for exemplary damages as the construction of the bund cannot be said be oppressive or arbitrary or an unconstitutional action by the servants of the government. The bund was constructed to enable the defendants to build a bridge to connect Kg Baru and Kg Teluk for the convenience of the residents living in that area. It was not done with the intention of causing hardship and inconvenience to the prawn breeders.

Other points

(a) Nuisance

[58] I reach a similar conclusion in relation to the plaintiffs' claim in nuisance. The bund was a potential nuisance which became an actual and actionable nuisance by reason of the culvert placed in the bund not meeting even the five years ARI criteria. It was inadequate to carry the rain water and diverted it on to the plaintiffs' land.

(b) Strict statutory liability

[59] The law governing any acts affecting rivers in the state of Perak is found in the Waters Act 1920. Section 5(1) of the Waters Act expressly provides that no person shall, except under and in all accordance with the terms of a licence under the Act, inter alia, in any manner obstruct or interfere with any river.

[60] Section 13 of the Waters Act 1920 expressly provides that no license under the Act shall exempt any person from liability in respect of any damage occasioned by such person to the property of the government or of any person. I agree with the plaintiff that the liability to pay damages under the Waters Act is therefore one of strict liability. The first defendant is therefore liable to the plaintiffs for the damage suffered by them as a result of the construction of the bund. Section 17 of the Waters Act imposes liability on both the second and third defendants as the employer of the first defendant, to pay for the damage occasioned by the negligence of the first defendant.

(c) Liability of joint tortfeasors

[61] The plaintiffs contended, and I agree, that the second and third defendants are not only vicariously liable but also jointly and severally liable for the loss suffered by the plaintiffs. Their liability is based on the principle that if each of several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage.

[62] This principle is lucidly explained in the judgment of the Federal Court in *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165. In delivering the judgment of the Federal court, Edgar Joseph Jr FCJ said:

> To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage.

CONCLUSION

[63] For the reasons given, I allow the plaintiffs' claim for damages. Judgment is entered in favour of the first plaintiff in the sum of RM98,551 and the second and third plaintiffs in the sum of RM58,551. The first defendant to pay costs of RM50,000 to the plaintiffs. As agreed, the second and third defendants shall indemnify the first defendant in respect of the damages awarded to the plaintiffs.

Plaintiffs' claim for damages in the sum of RM98,551 allowed to first plaintiff and in the sum of RM58,551 to the second and third plaintiffs with costs of RM50,000.

Reported by Kohila Nesan